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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

DAVID AARON TENENBAUM and
MADELINE GAIL TENENBAUM,

Petitioners,

v.

JOHN ASHCROFT, PAUL WOLFOWITZ, ULDRIC FIORE, JOHN SIMONINI, ALBERT D. SNYDER, MARK P. YOURCHOCK, and ROBERT M. RILEY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Where government officers previously invoked the state secrets privilege to dismiss an action against them, does the doctrine of collateral estoppel bar a subsequent action against them under *Bivens* for denial of access to the courts when the government subsequently admits that the state secrets privilege was invoked upon a false basis?

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STATEMENT OF JURISDICTION

The Opinion and Order Granting Defendants' Motion to Dismiss of the United States District Court for the Eastern District of Michigan from which Petitioners, the Tenenbaums, seek review was issued on July 23, 2009 (attached hereto as Addendum, Exh. 2) and was affirmed by the United States Court of Appeals for the Sixth Circuit in an unpublished Opinion on December 20, 2010 (attached hereto as Addendum, Exh. 1). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AT ISSUE IN THIS CASE

This case concerns the fundamental constitutional right to adequate, effective and meaningful access to the courts under the Article IV Privileges and Immunities Clause, the First Amendment Petition Clause and the Fifth Amendment Due Process Clause. The Article IV Privileges and Immunities Clause provides that: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." The First Amendment Petition Clause provides that Congress shall make no law abridging the right of the people "to petition the Government for a redress of grievances." The Fifth Amendment Due Process Clause provides that no person shall be "deprived of life, liberty, or property, without due process of law."

The Tenenbaums contend that these constitutional provisions were violated when the state secrets privilege was invoked to dismiss the Tenenbaums' previous lawsuit as the government has subsequently admitted that the basis for invoking the state secrets privilege was false.

STATEMENT OF THE CASE

A. Introduction.

On October 14, 1998, the Tenenbaums filed a Complaint (the "1998 Lawsuit") against Defendants, John Simonini, Albert Snyder, Mark Yourchock and Robert Riley (collectively, the "Instigating Defendants"). R. 16, Amended Complaint. The 1998 Lawsuit stemmed from the fact that the Instigating Defendants had falsely accused Petitioner, David Tenenbaum, of being an Israeli spy on the sole basis that Tenenbaum is a Jew. *Id.* In falsely accusing Tenenbaum of being a spy, the Instigating Defendants conducted an unlawful criminal counterintelligence investigation under the disguise of conducting a routine security clearance investigation to upgrade Tenenbaum's security clearance from secret to top secret. *Id.*

The Instigating Defendants' investigation resulted in the Tenenbaums being wrongfully subjected to an extensive, public criminal investigation by the FBI during which time Tenenbaum was vilified throughout the media as a spy and traitor because of the Instigating Defendants' false accusations. *Id.* The FBI/Department of Justice tellingly closed the investigation after finding no evidence to support the Instigating Defendants' false accusations. *Id.*

During the discovery process in the 1998 Lawsuit, the Instigating Defendants' sworn records and deposition testimony confirmed that the Instigating Defendants had no plausible defense to the Tenenbaums' claims because the sole basis and motivation for the Instigating Defendants' false accusations was religious discrimination

perpetuated by the use of an unlawful profile against American Jews. R. 21, Response at Exhs. 2-23. To avoid embarrassment and losing at trial, the Instigating Defendants along with Defendant, Uldric Fiore ("Fiore"), the Army's civil litigation chief, invoked the state secrets privilege contending that their defense to the Tenenbaums' claims somehow required the use of state secrets which could not be presented in a trial. *Id.* Defendants, John Ashcroft ("Ashcroft") and Paul Wolfowitz ("Wolfowitz"), provided affidavits which sealed portions and/or materials supposedly supporting the invocation of the state secrets privilege. *Id.* The Tenenbaums were never afforded the opportunity to review the sealed portions of the affidavits in order to respond thereto, and the 1998 Lawsuit was dismissed on the basis of the state secrets privilege. *Id.*

As the Tenenbaums were going through the appellate process in the 1998 Lawsuit, Tenenbaum appeared before the Department of Defense to appeal the revocation of his security clearance. *Id.* The Department of Defense not only restored Tenenbaum's secret security clearance, but upgraded it to top secret -- the highest level -- even though the Instigating Defendants' investigation was merely a ruse disguised as a routine security clearance upgrade investigation. *Id.*

Unfortunately, the Tenenbaums could not use the restoration and upgrading of Tenenbaum's security clearance during their appeal, and the dismissal of the 1998 Lawsuit on the basis of Defendants' invocation of the state secrets privilege was upheld. *Id.* The Tenenbaums, therefore, met with Senator Carl Levin, the then-Ranking Member and current Chairman of the Senate Armed Services Committee. R. 21, Response at Exh. 1, pp.

40-41. Senator Levin was so troubled by the events and allegations from the 1998 Lawsuit that he requested that the Office of the Inspector General for the Department of Defense conduct an independent, comprehensive investigation into the Tenenbaums' case on March 14, 2006. *Id.* Senator Levin stated to the Department of Defense that Tenenbaum's allegations of being falsely accused of espionage based upon religious discrimination were "serious enough that they must be addressed on the merits." *Id.* Senator Levin further stated that: "If true, [the Tenenbaums' allegations] indicate illegal discrimination and an abuse of power on the part of those who made the accusations and fabricated the evidence." *Id.*

On July 13, 2008, the Department of Defense issued its official investigation report (the "Report") which admits and exposes the fact that Defendants invoked the state secrets privilege in the 1998 Lawsuit upon a false basis. R. 21, Response at Exh. 1. Specifically, Defendants invoked the state secrets privilege by swearing to the Courts that, contrary to the Tenenbaums' claims: (1) evidence existed against Tenenbaum; (2) there was no religious discrimination or discriminatory profile used against Tenenbaum; and (3) there was no improper criminal counterintelligence investigation into Tenenbaum disguised as a routine security clearance upgrade investigation. R. 21, Response at Exhs. 19-21; R. 22, Reply to Motion to Dismiss at Exh. 1, pp. 7-8; R. 26, Motion for Leave to File Supplemental Brief at Exh. 4(D), pp. 17-18; *Id.* at Exh. 4(E), ¶¶ 1-2. The Department of Defense Report, however, squarely disproves each and every one of the reasons to which Defendants swore in invoking the state secrets privilege such that Defendants invoked the state secrets privilege upon a false basis, among other

sanctionable conduct. R. 21, Response at Exh. 1, pp. second page, ii, 5, 25-33, 48. The Department of Defense Report further confirms that it reviewed all of the relevant classified and unclassified information pertaining to Defendants' invocation of the state secrets privilege:

> **We reviewed the relevant classified and unclassified records, including records relating to the affidavits of for Deputy Secretary of Defense Mr. Paul Wolfowitz and Former Attorney General Mr. John Ashcroft, and relating to discovery response submissions from the DoD and Department of Justice.** *Id.* at p. 38 (emphasis added).

Finally, the Department of Defense Report confirms that all of the relevant federal agencies who had been involved in any way in the Tenenbaum investigation leading up to the 1998 Lawsuit were given the opportunity to comment on and provide all relevant records in connection with the Tenenbaum case as part of the Department of Defense investigation, and the Report itself is based upon all of the relevant records and comments that were obtained from such agencies. *Id.*; R. 21, Response at Exh. 1.

Based upon the Department of Defense Report, the Tenenbaums commenced the instant *Bivens* action on the basis that they were wrongfully deprived of their fundamental constitutional right to have adequate, effective and meaningful access to the Courts when the Defendants invoked the state secrets privilege upon a false basis in order to cause the dismissal of the Tenenbaums' 1998 Lawsuit. R. 16, Amended Complaint.

B. Defendants' Invocation of the State Secrets Privilege Upon a False Basis in the 1998 Lawsuit.

In their briefs to dismiss the Tenenbaums' 1998 Lawsuit, Defendants swore to the Courts that the evidence at issue in their invocation of the state secrets privilege would somehow show the following: (1) there was evidence against Tenenbaum; (2) there was no religious discrimination or anti-Semitic profile directed against Tenenbaum; and (3) there was no criminal counterintelligence investigation into Tenenbaum under the guise of a routine security clearance upgrade investigation to cause the FBI to investigate Tenenbaum. R. 21, Response at Exhs. 19-21; R. 22, Reply to Motion to Dismiss at Exh. 1, pp. 7-8; R. 26, Motion for Leave to File Supplemental Brief at Exh. 4(D), pp. 17-18; *Id.* at Exh. 4(E), ¶¶ 1-2.

In reviewing Defendants' invocation of the state secrets privilege in the 1998 Lawsuit, the District Court focused exclusively on Defendants' sworn religious discrimination reasoning for invoking the privilege and concluded that allegations of religious discrimination were woven throughout the Tenenbaums' claims such that the state secrets privilege required dismissal of the 1998 Lawsuit:

> [T]he parties and the court agree that
>
> > the core issue of this case involves Defendants' invidious discrimination against Tenenbaum . . . .
>
> (Pls.' Resp. Br. at 27). In order to defend against these allegations Defendants would

> have to jeopardize state security. Specifically, Defendants allege that they 'cannot explain or disclose the actual reasons or motivations for their actions without revealing state secrets.' (Defs.' Rep. Br. at 3.) Further, Defendants assert that 'they are precluded from adequately describing and explaining the true nature and purpose of their actions without disclosing state secret information.' (*Id.* at 4.) Having reviewed the sealed materials, the court agrees.
>
> As for the particular counts, the court first notes that the allegation of religious discrimination is woven throughout Plaintiff's entire Second Amended Complaint. Thus, if the court were to allow any claim to proceed, the court finds that Defendants could not adequately defend against Plaintiff's assertions, because such defense would entail disclosure of facts which would create a reasonable, if not certain, danger to national security. This alone justifies dismissal of Plaintiff's entire action. R. 21, Response at Exh. 4, pp. 8-9.

The District Court then listed each of the Tenenbaums' pending claims in the 1998 Lawsuit while ruling that each claim would require state secrets to explain the motivations and actions taken against the Tenenbaums because the Tenenbaums' allegations of religious discrimination were woven throughout their claims. *Id.* at pp. 10-11.

Although the District Court focused on only one of Defendants' sworn reasons for invoking the state secrets privilege, the Department of Defense Report squarely disproves each and every one of Defendants' sworn

reasons. R. 21, Response at Exh. 1, pp. second page, ii, 5, 25-33, 48.

1. The Department of Defense Report Admits that No Evidence Existed Against Tenenbaum, and that Defendants Were Advised of this Fact More than Five Years Before Invoking the State Secrets Privilege.

In support of their invocation of the state secrets privilege in the 1998 Lawsuit, Defendants swore to the Courts that evidence existed against Tenenbaum. R. 22, Reply to Motion to Dismiss at Exh. 1, p. 5. Specifically, Defendants swore that "[Tenenbaum's] assertion that it is undisputed that there is no evidence that Tenenbaum did anything wrong or illegal is incorrect." *Id.* The Department of Defense Report, however, admits that no evidence existed against Tenenbaum and that Defendants were advised of this very fact by the Department of Justice more than five years before Defendants invoked the state secrets privilege. R. 21, Response at Exh. 1, pp. 5, 48.

The Department of Defense Report specifically admits that the FBI's lead investigator into the allegations against Tenenbaum notified the Army in the fall of 1996 -- more than five years before Defendants asserted the state secrets privilege -- that the "**FBI investigation has developed NO EVIDENCE to support the contention that [Tenenbaum] is involved in espionage or treason against the United States.**" *Id.* at p. 5 (emphasis added). The Department of Defense Report further admits that the United States Attorney's Office advised the Department of Defense on September 8, 1997 -- more than four years before Defendants asserted the state secrets privilege

-- that "**NO EVIDENCE was developed to support the allegation**" of espionage against Tenenbaum. *Id.* at p. 48 (emphasis added).

2. The Department of Defense Report Admits that Tenenbaum Was the Victim of Both Religious Discrimination and a "Disavowed," "Particularly Repugnant" Profile Against American Jews.

In further support of their invocation of the state secrets privilege, Defendants swore to the Courts that there was no religious discrimination against Tenenbaum and that Tenenbaum was not the victim of a profile against American Jews. R. 22, Reply to Motion to Dismiss at Exh. 1, pp. 7-8; R. 26, Motion for Leave to File Supplemental Brief at 4(D), p. 17.; *Id.* at Exh. 4(E), pp. 3-4. Defendants swore to the following in their briefs to the Courts:

> Defendants Simonini, Riley, Yourchock and Snyder deny that they acted toward [Tenenbaum] at any time out of anti-Semitic animus or with invidiously discriminatory motivations. R. 26, Motion for Leave to File Supplemental Brief at Exh. 4(E), p. 3.
>
> * * *
>
> As to the first category of information – the 'counter-intelligence profile' – no such profile exists. [Tenenbaum] contends that he has 'verified' that a 'key factor' in various investigations was '[Tenenbaum's] ethnic and religious beliefs and associations with Israeli

> officials[.]' (Plaintiff's motion, ¶ 5). To the extent that [Tenenbaum] concludes that the discovery record establishes that there is a 'counter-intelligence profile' or that he was subjected to investigation because of his religion, he misconstrues the record. R. 22, Reply to Motion to Dismiss at Exh. 1, pp. 7-8.
>
> * * *
>
> [Tenenbaum] claims that the government relied upon a 'counterintelligence profile' that targets individuals with security clearances who have a religious or national affinity toward a particular country, in this case Israel. In fact, however, [Tenenbaum] was not targeted by any profile. R. 26, Motion for Leave to File Supplemental Brief at Exh. 4(D), p. 17.
>
> * * *
>
> Likewise, defendants deny the aspect of [Tenenbaum's] core issue claim that they caused and/or conducted an unlawful counterintelligence investigation of Tenenbaum to take place under the guise of a routine security clearance upgrade investigation in order to coerce Tenenbaum into a result-oriented post-polygraph confession to finally justify an FBI criminal investigation. R. 26, Motion for Leave to File Supplemental Brief at Exh. 4(E), p. 4.

In addition, both Wolfowitz's and Ashcroft's affidavits swore to the veracity of Defendants' sworn statements,

and Ashcroft further attested that Tenenbaum was not targeted by a discriminatory counterintelligence profile. R. 26, Motion for Leave to File Supplemental Brief at Declaration of John Ashcroft, pp. 3-4.

Contrary to Defendants' sworn statements, the Department of Defense's Report admits that Tenenbaum was in fact the victim of both religious discrimination and a "particularly repugnant," "disavowed" profile against American Jews. R. 21, Response at Exh. 1, pp. second page, ii, 25-27. The words of the Inspector General himself in his cover letter to Senator Levin and the Department of Defense in its Report could not be clearer:

> **Attached is our independent review of the case of Mr. David Tenenbaum requested in your letter of March 14, 2006. I carefully reviewed the Tenenbaum case for many months, including many classified and unclassified documents, and received a large number of briefings. It is my opinion that Mr. Tenenbaum's ethnic background, and his deep devotion to the practice of his faith were factors in the many investigations. Mr. Tenenbaum was subjected to unusual and unwelcome scrutiny because of his faith and ethnic background, a practice that would undoubtedly fit a definition of discrimination, whether actionable or not. The attached report supports these views.**
>
> **It is also my opinion that the initial personnel security and counterintelligence investigation process was poorly handled**

and managed, although the appeal process ultimately exonerated Mr. David Tenenbaum. It is my belief that Mr. Tenenbaum is, and has always been, a dedicated, loyal and professional civil servant in the service of our Nation. *Id.* at second page (emphasis added).

* * *

We found that Mr. Tenenbaum's religion was a factor in the decision that resulted in the inappropriate continuation of the Personnel Security Investigation to upgrade Mr. Tenenbaum's security clearance. The October 1996 briefing to Mr. Tenenbaum's supervisor and other TACOM leadership included a disavowed policy statement, 'Host Nation [Israel] is known to try to exploit nationalist and religious tendencies.' It was well known that Mr. Tenenbaum was Jewish, lived his religious beliefs and by his actions appeared to have a close affinity for Israel. But for Mr. Tenenbaum's religion, the investigations would likely have taken a different course. We believe that Mr. Tenenbaum was subjected to unusual and unwelcome scrutiny because of his faith and ethnic background, a practice that would undoubtedly fit a definition of discrimination, whether actionable or not. *Id.* at p. ii (emphasis added).

* * *

The decision to continue with the personnel security investigation at the October 21,

> **1996 meeting set a chain of events in motion that would have an adverse impact on any DoD employee. We believe that in this case [Tenenbaum's] religion and ethnicity was a factor in that decision. As stated in response to the 1995 DIS CI Country Profile, the Assistant Secretary for Defense for Command, Control, Communications and Intelligence stated (in January 1996) that singling out ethnicity as a matter of counterintelligence vulnerability is particularly repugnant to the Department. But for [Tenenbaum's] religion, the investigations would likely have taken a different course. Therefore, we believe he was subjected to closer and more protracted scrutiny because of his religion and ethnicity. This unusual and unwelcome scrutiny because of his faith and ethnic background, a practice that would undoubtedly fit a definition of discrimination, whether actionable or not.** *Id.* at p. 27 (emphasis added).

The Department of Defense's admissions in the Report as to the "disavowed" and "particularly repugnant" profile against American Jews refers to a 1995 profile that was drafted and issued without authorization by an employee of a Department of Defense agency, the Defense Investigative Service (DIS,currently known as the Defense Security Service (DSS)) and singled out American Jews as security risks. *Id.* at ii, 25-27. As the Department of Defense further admits in its Report, the Department of Defense, through the Assistant Secretary for Defense, disavowed that profile as soon as it came to the Department of Defense's attention in January of 1996:

> **I want to stress that the content of this document [the profile] does not reflect the official position of the DoD. While we object to the document in general, singling out ethnicity as a matter of counterintelligence vulnerability is particularly repugnant to the Department.** *Id.* at 26 (emphasis added).

The Department of Defense's Report then admits that the "disavowed" and "particularly repugnant" profile against American Jews was in fact used against Tenenbaum -- because he is Jewish -- in October 1996 which was 10 months after the Department of Defense's disavowal and public condemnation of the profile. *Id.* at ii, 26-27.

3. The Department of Defense Report Admits that Tenenbaum Was the Victim of an Improper Criminal Investigation.

In further support of their invocation of the state secrets privilege, Defendants swore to the Courts that Tenenbaum was not the victim of an improper criminal counterintelligence investigation that was disguised as a routine security clearance upgrade investigation:

> Likewise, defendants deny the aspect of [Tenenbaum's] core issue claim that they caused and/or conducted an unlawful counterintelligence investigation of Tenenbaum to take place under the guise of a routine security clearance upgrade investigation in order to coerce Tenenbaum into a result-oriented post-polygraph confession to finally justify an FBI criminal investigation. R. 26, Motion for Leave to File Supplemental Brief at Exh. 4(E), p. 4.

The Department of Defense Report, however, admits that: "**The personnel security investigation was improperly used as a ruse for a counterintelligence investigation.**" R. 21, Response at Exh. 1, p. ii (emphasis added). The Report further admits that the ruse was perpetuated by Defendants' religious discrimination against Tenenbaum as well as the "disavowed" and "particularly repugnant" profile against American Jews. *Id.* at pp. ii, 25-27.

In sum, the Department of Defense Report admits that Defendants invoked the state secrets privilege upon a false basis inasmuch as each and every one of Defendants' sworn reasons for invoking the state secrets privilege was false. *Id.* at pp. second page, ii, 5, 25-33, 48. Upon issuance of the Report on July 13, 2008, the Department of Defense submitted the Report to each and every Department of Defense official and Congressional Committee that maintains responsibility over Department of Defense matters and/or matters of government oversight and reform:

- Senate Subcommittee on Defense, Committee on Appropriations;
- Senate Committee on Armed Services;
- Senate Committee on Homeland Security and Governmental Affairs;
- Senate Subcommittee on Oversight and Government Management, the Federal Workforce, and the District of Columbia; Committee on Homeland Security and Government Affairs;

- Senate Select Committee on Intelligence;
- House Subcommittee on Defense, Committee on Appropriations;
- House Committee on Armed Services;
- House Committee on Oversight and Government Reform;
- House Subcommittee on National Security and Foreign Affairs; Committee on Oversight and Government Reform;
- House Subcommittee on Federal Workforce, Postal Service, and the District of Columbia; Committee on Oversight and Government Reform;
- House Permanent Select Committee on Intelligence;
- Under Secretary of Defense for Intelligence;
- General Counsel of the Department of Defense;
- Secretary of the Army;
- General Counsel, Department of the Army;
- Deputy of Chief of Staff for Intelligence, G-2;
- Inspector General, Department of the Army;

- Commanding General, U.S. Army Material Command;
- Commanding General, U.S. Army Intelligence and Security Command; and
- Director, Defense Security Service. *Id.* at p. 55.

C. The Department of Defense Report Would Have Been Even Stronger in the Tenenbaum's Favor but for Improper Interference from Fiore.

Fiore, who served as the Army's civil litigation chief and recommended invoking the state secrets privilege to dismiss the Tenenbaums' 1998 Lawsuit, was subsequently appointed as General Counsel for the Office of the Inspector General for the Department of Defense. R. 16, Amended Complaint at ¶ 98; R. 21, Response at Exh. 22. Department of Defense records show that, when Senator Levin initially requested an investigation into the merits of the 1998 Lawsuit, Fiore attempted to decline Senator Levin's request while concealing from Senator Levin the fact that Fiore had a blatant conflict of interest since he (Fiore) had recommended invoking the state secrets privilege. R. 21, Response at Exh. 23, p. third-to-last; R. 16, Amended Complaint at¶ 99. Interestingly, Fiore has a confirmed history of: (1) participating in investigations despite having a conflict of interest; and (2) making inaccurate statements to and omitting material information from United States Senators. R. 16, Amended Complaint at ¶ 99.

Department of Defense records further show that, even after Fiore's conflict of interest was discovered by the Department of Defense, Fiore failed to recuse himself from the Tenenbaum investigation. R. 21, Response at Exh. 23, p. third-to-last. Moreover, Fiore's interference in the Department of Defense investigation caused the Report to contain only a small fraction of the substantial evidence and findings in the Tenenbaums' favor. R. 21, Response at Exh. 23, last page; R. 16, Amended Complaint at ¶ 105. Thus, the Department of Defense Report's admissions and exposure of the fact that Defendants invoked the state secrets privilege upon a false basis speaks volumes to the falsity of Defendants' sworn statements to the courts in invoking the privilege. *Id.*

D. The Tenenbaums' *Bivens* Action Is Summarily Dismissed Under the Doctrine of Collateral Estoppel.

With the Department of Defense's Report admitting and exposing the fact that each of Defendants' sworn reasons for invoking the state secrets privilege was false, the Tenenbaums commenced the instant *Bivens* action. R. 16, Amended Complaint. The basis for the Tenenbaums' *Bivens* action is that the Tenenbaums were wrongfully deprived of their fundamental constitutional right to have adequate, effective and meaningful access to the Courts when the 1998 Lawsuit was dismissed because Defendants invoked the state secrets privilege upon a false basis. *Id.*

The District Court, however, summarily dismissed the Tenenbaums' *Bivens* action on July 23, 2009 pursuant to the doctrine of collateral estoppel on the grounds that, irrespective of the falsity of Defendants' sworn basis for

invoking the state secrets privilege, the District Court had already ruled upon the invocation of the privilege[1]. *See*, Addendum, Exh. 2. The Court of Appeals for the Sixth Circuit issued an unpublished opinion affirming the District Court, although the Court of Appeals misidentified this action as an action under 42 U.S.C. § 1983 as opposed to *Bivens*. *See*, Addendum, Exh. 1.

E. Jurisdiction Before the District Court.

Federal jurisdiction was based upon: (1) 28 U.S.C. § 1331 as this case was brought under the Constitution of the United States -- the Article IV Privileges and Immunities Clause, the First Amendment Petition Clause and the Fifth Amendment Due Process Clause -- providing the

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1. Hours before the District Court issued its opinion, the Tenenbaums filed an unopposed Motion for Leave to File Supplemental Brief in Opposition to Defendants' Motion to Dismiss. R. 26, Motion for Leave to File Supplemental Brief. The Motion for Leave to File Supplemental Brief was based upon new authority -- *Horn v. Huddle*, which became public five days after the hearing on Defendants' Motion to Dismiss this case. *Id. Horn v. Huddle* is directly on point and, to the Tenenbaums' knowledge, is the only case that addresses a situation where, as here, government officers invoked the state secrets privilege upon a false basis. *Id. Horn v. Huddle* specifically holds that fraud upon the court under Fed. R. Civ. P. 60(d)(3) is committed where, as here, the state secrets privilege is asserted upon a false basis, and such fraud upon the court requires reinstatement of the action that was dismissed. *Id.* Although the Tenenbaums attempted to argue that the District Court should follow *Horn v. Huddle* and reinstate the 1998 Lawsuit if the doctrine of collateral estoppel was applied to this case, the District Court did not consider or address the Tenenbaums' Motion for Leave to File Supplemental Brief. *See*, Addendum, Exh. 2.

fundamental constitutional right to adequate, effective and meaningful access to the courts; (2) 28 U.S.C. § 1343(a)(3) as this case resulted from Defendants' assertion of the state secrets privilege upon a false basis to deprive the Tenenbaums of their fundamental constitutional right to adequate, effective and meaningful access to the courts; and (3) 28 U.S.C. § 1391 as this case was brought in the venue where the cause of action arose.

REASONS FOR GRANTING THE PETITION

I. WHERE GOVERNMENT OFFICERS PREVIOUSLY INVOKED THE STATE SECRETS PRIVILEGE TO DISMISS AN ACTION AGAINST THEM, THE DOCTRINE OF COLLATERAL ESTOPPEL SHOULD NOT BAR A SUBSEQUENT *BIVENS* ACTION AGAINST THEM FOR DENIAL OF ACCESS TO THE COURTS WHEN THE GOVERNMENT SUBSEQUENTLY ADMITS THAT THE STATE SECRETS PRIVILEGE WAS INVOKED UPON A FALSE BASIS.

In *Bivens*, this Court created a private cause of action for individuals who are damaged by virtue of federal agents' violations of the Constitution. *Bivens v. Six Unknown Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 397 (1971) (a "petitioner is entitled to recover money damages from any injuries he has suffered as a result of [federal] agents' violation [of the Constitution]"). This Court's rationale for establishing *Bivens* claims came from the landmark *Marbury v. Madison* case: "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury." *Bivens v. Six Unknown*

Agents of Federal Bureau of Narcotics, 403 U.S. 388, 397 (1971), *quoting*, *Marbury v. Madison*, 1 Cranch 137, 163 (1803).

The fundamental constitutional right of access to the courts has been recognized by this Court through five constitutional provisions[2]:

> Decisions of this Court have grounded the right of access to courts in the Article IV Privileges and Immunities Clause, *Chambers v. Baltimore & Ohio R. Co.*, 207 U.S. 142, 148, 52 L. Ed. 143, 28 S. Ct. 34, 6 Ohio L. Rep. 498 (1907); *Blake v. McClung*, 172 U.S. 239, 249, 43 L. Ed. 432, 19 S. Ct. 165 (1898); *Slaughter-House Cases*, 83 U.S. 36, 16 Wall. 36, 79, 21 L. Ed. 394 (1873), the First Amendment Petition Clause, *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741, 76 L. Ed. 2d 277, 103 S. Ct. 2161 (1983); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513, 30 L. Ed. 2d 642, 92 S. Ct. 609 (1972), the Fifth Amendment Due Process Clause, *Murray v. Giarratano*, 492 U.S. 1, 11, 106 L. Ed. 2d 1, 109 S. Ct. 2765, n. 6 (1989) (plurality opinion); *Walters v. National Assn. of Radiation Survivors*, 473 U.S. 305, 335, 87 L. Ed. 2d 220, 105 S. Ct. 3180 (1985); and the Fourteenth Amendment Equal Protection, *Pennsylvania v. Finley*, 481 U.S. 551, 557, 95

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2. Inasmuch as this is a federal lawsuit against federal agents by a federal employee, the Tenenbaums' *Bivens* claim is filed pursuant to the Article IV Privileges and Immunities Clause, the First Amendment Petition Clause and the Fifth Amendment Due Process Clause.

> L. Ed. 2d 539, 107 S. Ct. 1990 (1987), and Due Process Clauses, *Wolff v. McDonnell*, 418 U.S. 539, 576, 41 L. Ed. 2d 935, 94 S. Ct. 2963, 71 Ohio Op. 2d 336 (1974); *Boddie v. Connecticut*, 401 U.S. 371, 380-381, 28 L. Ed. 2d 113, 91 S. Ct. 780 (1971). *Christopher v. Harbury*, 536 U.S. 403, 415 n. 12 (2002).

The fundamental constitutional right of access to the courts requires that access to the courts must be "adequate, effective and meaningful." *Bounds v. Smith*, 430 U.S. 817, 822 (1977).

Based upon *Bivens* and the fundamental constitutional right to adequate, effective and meaningful access to the courts, the Tenenbaums have filed the instant *Bivens* action because the Department of Defense Report admits and exposes the fact that Defendants invoked the state secrets privilege upon a false basis in order to cause the dismissal of the Tenenbaums' 1998 Lawsuit. The Tenenbaums were deprived of a trial on the merits before a jury of their peers when Defendants submitted false sworn statements invoking the state secrets privilege such that the Tenenbaums' remedy lies in a *Bivens* action now that the Department of Defense Report has admitted and exposed the fact that the state secrets privilege was invoked upon a false basis.

Under the circumstances of this case, and any similar *Bivens* action where the state secrets privilege is invoked upon a false basis, the doctrine of collateral estoppel does not and should not be applied because the requirements for collateral estoppel cannot be met. Moreover, application of collateral estoppel to such *Bivens* actions creates a

black hole in justice/liberty where government officers may legally lie to the courts in invoking the state secrets privilege while being relieved of the threat of repercussions in the event that the officers' basis for invoking the privilege is subsequently exposed as false.

This Court has set forth four requirements that must all be met before collateral estoppel may be applied to bar litigation of an issue:

1. The precise issue raised in the present case must have been raised and actually litigated in the prior proceeding;[3]

2. Determination of the issue must have been necessary to the outcome of the prior proceeding;[4]

3. The prior proceeding must have been decided on the merits;[5] and

4. The party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.[6]

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3. *See, Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n.5 (1979); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Found.*, 402 U.S. 313, 323 (1971).

4. *See, Parklane Hosiery Co.*, 439 U.S. at 326 n.5.

5. *See, Blonder-Tongue Laboratories, Inc.*, 402 U.S. at 323.

6. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 480-481 (1982) (citations omitted).

In addition, collateral estoppel has been rejected in cases where its application would either: (1) contravene the Constitution and/or an overriding public policy; or (2) result in manifest injustice. *See, e.g., Thompson v. Schweiker*, 665 F.2d 936, 940-941 (9th Cir. 1982); *In re Piper Aircraft Distribution System Antitrust Litigation*, 551 F.2d 213, 220 (8th Cir. 1977); *Moch v. East Baton Rouge Parish School*, 548 F.2d 594, 598 (5th Cir. 1977); *Tipler v. E.I. DuPont deNemours and Co., Inc.*, 443 F.2d 125, 128 (6th Cir. 1971); *Grantham v. McGraw-Edison Co.*, 444 F.2d 210, 217 (7th Cir. 1971). To the Tenenbaums' knowledge, no federal circuit has rejected either of these bases for rejecting the application of collateral estoppel to a case.

As set forth below, none of the requirements for collateral estoppel is met in cases where, as here, a *Bivens* action is commenced for denial of access to the courts after the government subsequently admits or exposes the fact that the state secrets privilege was invoked upon a false basis to dismiss a prior lawsuit. Therefore, the doctrine of collateral estoppel may not be applied to such an action.

A. The Precise Issue Raised in the Present Case Was Not the Issue Raised and Actually Litigated in the 1998 Lawsuit.

The issue before the District Court in the 1998 Lawsuit was whether Defendants had properly invoked the state secrets privilege by submitting sworn statements that: (1) evidence supposedly existed to support the accusations against Tenenbaum; (2) such supposed evidence demonstrated that Tenenbaum was not the victim of religious discrimination or a profile against Jewish Americans; and (3) such supposed evidence demonstrated

that Tenenbaum was not victim of an improper criminal investigation disguised as a routine security clearance investigation. R. 21, Response at Exh. 4. The issue in the present case is whether the Tenenbaums were deprived of their fundamental constitutional right to adequate, effective and meaningful access to the courts because, nearly six years after the 1998 Lawsuit was dismissed, the Department of Defense Report admits and exposes the fact that Defendants invoked the state secrets privilege on a false basis. R. 21, Response at Exh. 1, pp. second page, ii, 5, 25-33, 48. Therefore, collateral estoppel clearly does not apply to a *Bivens* action, such as this, for deprivation of the fundamental constitutional right of adequate, effective and meaningful access to the courts where the government admits that the state secrets privilege was invoked upon a false basis.

B. There Was No Determination of the Validity of the Tenenbaums' *Bivens* Action in the 1998 Lawsuit Because There Was No *Bivens* Action at that Time -- the Department of Defense Report Did Not Admit/Expose Defendants' Invocation of the State Secrets Privilege on a False Basis Until Nearly Six Years Later.

The Tenenbaums' *Bivens* action is the result of the Department of Defense Report admitting and exposing the fact that Defendants invoked the state secrets privilege on a false basis. R. 16, Amended Complaint; R. 21, Response at Exh. 1, pp. second page, ii, 5, 25-33, 48. The Department of Defense Report was issued July 13, 2008 -- nearly six years after the dismissal of the 1998 Lawsuit -- such that there was obviously no determination of the Tenenbaums' *Bivens* action at the time that the 1998 Lawsuit was dismissed. *Id.*; *Id.* at Exh. 4.

C. The 1998 Lawsuit Did Not Involve Any Decision on the Merits.

It is undisputed that the 1998 Lawsuit was never decided on the merits because it was dismissed after Defendants invoked the state secrets privilege. R. 21, Response at Exh. 4. In fact, one of the reasons for Senator Levin's request for the Department of Defense investigation was so that a finding would be made on the merits of the case. *Id.* at Exh. 1, pp. 40-41 (the Tenenbaums' allegations "must be addressed on the merits"). Furthermore, inasmuch as the Tenenbaums' *Bivens* claim is the result of the Department of Defense Report which was issued nearly six years after Defendants' frivolous invocation of the state secrets privilege, there was certainly no decision on the merits as to the Tenenbaums' *Bivens* claim which obviously was not before the courts in the 1998 Lawsuit. *Id.* at Exh. 1.

D. As in the Instant Case, a Party Is Not Afforded a Full or Fair Opportunity to Litigate a Claim or Issue Where the State Secrets Privilege Is Invoked Upon a False Basis.

In expanding upon the holding that collateral estoppel does not apply when the party against whom estoppel is sought did not have a full and fair opportunity to litigate the issue, this Court explained that "[r]edetermination of issues is warranted if there is a reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation." *Kremer*, 456 U.S. at 481, *quoting*, *Montana v. United States*, 440 U.S. 147, 164, n.11 (1979).

In the instant action, there is every reason to doubt the quality, extensiveness, and fairness of Defendants' invocation of the state secrets privilege in the 1998 Lawsuit because the Department of Defense Report exposes each and every one of Defendants' sworn reasons for invoking the state secrets privilege as false. R. 21, Response at Exh. 1, pp. ii, 5, 25-33, 48. The Tenenbaums were never permitted to access, review or challenge the sealed affidavits submitted by Defendants during the 1998 Lawsuit; thus, the issuance of the Department of Defense Report on July 13, 2008 was the first time that the basis for Defendants' invocation of the state secrets privilege was exposed as false. *Id.* at Exh. 2.

Had the Tenenbaums been in possession of the Department of Defense Report during the 1998 Lawsuit, then the Tenenbaums could have exposed Defendants' basis for invoking the state secrets privilege as false and proceeded with their claims. *Id.* Indeed, all of the evidence adduced by the parties during the 1998 Lawsuit is consistent with the Department of Defense's investigative findings in its Report that Tenenbaum was the victim of religious discrimination:

- Simonini testified that Tenenbaum was referred to as the "little Jewish spy." R. 21, Response at Exh. 12, pp. 222-224.

- Simonini also testified that he suspected Tenenbaum of being a security risk solely because Tenenbaum is Jewish. *Id.* at Exh. 12, pp. 127-128, 229.

- Riley testified that people were making accusations against Tenenbaum because of Tenenbaum's ethnic heritage, religious beliefs and affinity towards Israel. *Id.* at Exh. 14, pp. 146-148.

- Although Snyder curiously destroyed his records, the FBI notes from Snyder's statements indicate that Snyder told the FBI that Tenenbaum provided information to Israel because Tenenbaum is Jewish. *Id.* at Exh. 1, pp. 30, 33.

- Snyder testified that his polygraph examination of Tenenbaum was the only examination where he commented on a person's Jewish background. *Id.* at Exh. 15, p. 156.

- One of the Army counterintelligence officers investigating Tenenbaum (albeit unlawfully) testified that Tenenbaum's being Jewish was the number one factor in suspecting Tenenbaum of being an Israeli spy. *Id.* at Exh. 16, p. 29.

- The Director/Commander of TACOM's research base, Dr. Richard McClelland, who was Tenenbaum's highest-level supervisor at the time of the investigations, stated in a January 10, 2001 letter in support of Tenenbaum that: "It is my opinion that the case is based on innuendo and lacks substance." *Id.* at Exh. 8, second letter.

- Dr. McClelland also testified that people were making false accusations against Tenenbaum because Tenenbaum is Jewish and that the investigations into Tenenbaum would not have occurred had Tenenbaum not been Jewish. *Id.* at Exh. 17, pp. 33-34, 57.

- Even Paul Barnard, the Army counterintelligence officer who devised the ruse to investigate Tenenbaum under the guise of a security clearance upgrade testified that the false accusations were made because Tenenbaum is Jewish. *Id.* at Exh. 18, pp. 135-136.

- Barnard then submitted a letter of support on Tenenbaum's behalf providing, *inter alia*, that: "I have never before seen the exertion of investigative related activity to verify allegations as I have in this case. . . . The result of all this investigative activity is that no one has substantiated any wrongdoing. . . . There has not been, to my knowledge, one substantiated allegation that can be linked to a specific requirement, nor has some tangible evidence been developed to support any allegation." *Id.* at Exh. 11.

- On February 3, 1998, the U.S. Attorney's Office for the Eastern District of Michigan issued a letter commending the exceptional thoroughness of the FBI agents and stating that: "There is no question that if evidence existed which would prove this case, then

these agents would have found it." *Id.* at Exh. 6.

- FBI reports (which were also presented in the appeal of the 1998 Lawsuit) state that there was never any evidence against Tenenbaum, and that the only lead was Snyder's anti-Semitic statement to the FBI after his polygraph. *Id.* at Exh. 2, ¶ 83.

- James Gugino, the FBI's lead investigator, testified that: (1) he had reservations about opening the investigation into Tenenbaum; (2) he had concerns about the reliability of the information that Snyder provided to the FBI; and (3) he expressed his sympathies to Tenenbaum for opening the investigation. *Id.* at Exh. 7, pp. 124-126.

- Tenenbaum's highest-level supervisors confirmed in writing that Tenenbaum's contact with Israelis was always reported and approved. *Id.* a Exhs. 8-9.

- Michael Shropshire, the Army Headquarters official responsible for approving all Israeli visits testified that: (1) he officially approved all of the Israeli personnel who visited or were stationed at TACOM; (2) there was no Army prohibition against even social let alone professional contacts with liaison officers from other countries; and (3) there was never any finding that Tenenbaum had any improper contacts with any liaison

officers from Israel or any other countries. *Id.* at Exh. 10, pp. 8-11, 19-21.

Moreover, the Department of Defense Report expressly sides with the Tenenbaums in recognizing that the Tenenbaums were the victims of religious discrimination, a profile against American Jews and an improper criminal investigation. R. 21, Response at Exh. 1. The Department of Defense Report further highlights the fact that Tenenbaum's security clearance was not only restored, but it was upgraded to the highest level -- top secret -- despite the fact that the Instigating Defendants' investigation was an improper ruse. *Id.* Therefore, it is abundantly clear that the Tenenbaums were not afforded a full or fair opportunity to litigate their claims in the 1998 Lawsuit as such claims were dismissed by a frivolous invocation of the state secrets privilege.

E. Application of Collateral Estoppel to Uphold Defendants' Invocation of the State Secrets Privilege on a False Basis Violates the United States Constitution and the Public Policies Governing Defendants' Conduct.

The Tenenbaums' *Bivens* claim is predicated upon the fact that the Tenenbaums were deprived of their fundamental right to adequate, effective and meaningful access to the Courts when Defendants invoked the state secrets privilege upon a false basis in order to mislead and deceive the Courts into dismissing the 1998 Lawsuit. Inasmuch as the Department of Defense Report unequivocally establishes that Defendants' sealed affidavits and sworn representations to the Courts were false, Defendants cannot in good conscience contend that

the Constitution or public policy supports the application of collateral estoppel. The Fifth Circuit Court of Appeals has had occasion to address the issue where application of collateral estoppel would have resulted in a violation of a constitutional right and, on that basis, held that collateral estoppel may not be applied in such an instance. *See, e.g.*, *Moch*, 548 F.2d at 598.

The very premise of Defendants' position is that they should be rewarded for invoking the state secrets privilege upon a false basis by applying collateral estoppel to deprive the Tenenbaums of their fundamental constitutional right of access to the Courts for a second time. Defendants' position further seeks to establish a legal precedent where government officers may legally lie to the Courts in asserting the state secrets privilege while being relieved of the threat of repercussions in the event that the officials' basis for invoking the privilege is subsequently exposed as false.

In addition to violating the fundamental constitutional right of access to the courts, Defendants' position violates the overriding public policies that governed and continue to govern Defendants' behavior. Specifically, as employees of the Executive Branch, Defendants were, at all times relevant hereto, governed by Executive Order 12958 which provides, in relevant part, that:

> In no case shall information be classified in order to: (1) conceal violations of law, inefficiency, or administrative error; (2) prevent embarrassment to a person, organization, or agency; . . . or (4) prevent or delay the release of information that does not require protection

> in the interest of national security. Executive Order 12958 § 1.7(a) (f/k/a § 1.8(a)).

Wolfowitz's Declaration and Claim of Privilege of the Deputy Secretary of Defense recognized the controlling authority of Executive Order 12958, yet both Wolfowitz and Ashcroft invoked the state secrets privilege upon a false basis. R. 22, Reply to Motion to Dismiss at Exh. 1, Affidavit of John Ashcroft and Declaration and Claim of Privilege of the Deputy Secretary of Defense. Moreover, both Wolfowitz and Ashcroft falsely swore and attested that there was evidence against Tenenbaum that would rebut the Tenenbaums' claims when, in fact, this was not true. *Id.*; R. 21, Response at Exh. 1, pp. ii, 5, 25-27, 48. The reality of the 1998 Lawsuit, as established by the Department of Defense Report, is that Defendants had no evidence, and thus no defense, against the Tenenbaums' claims. *Id.*

Furthermore, with respect to Ashcroft and Defendants' counsel, the additional overriding public policy for the Department of Justice is "to ensure fair and impartial administration of justice for all Americans." United States Department of Justice, http://www.usdoj.gov/02organizations (visited March 10, 2011). Defendants' invocation of the state secrets privilege upon a false basis squarely and unquestionably contradicts the very constitutional provisions and overriding public policies by which Defendants were and are governed. *Id.* Therefore, Defendants have no valid basis for seeking application of the doctrine of collateral estoppel.

Finally, it is worth noting that the Department of Justice has confirmed that the state secrets privilege

has been abused by the executive branch. United States Department of Justice, *Attorney General Establishes New State Secrets Policies and Procedures* (visited Dec. 22, 2009) <http://www.justice.gov/opa/pr/2009/September/09-ag-1013.html>. On September 23, 2009, Attorney General Eric Holder implemented "new Department of Justice policies and procedures in order to ensure greater accountability in the government's assertion of the state secrets privilege in litigation." *Id.* The Department of Justice has acknowledged that "[t]his policy is an important step toward rebuilding the public's trust in the government's use of this privilege." *Id.* The Department of Justice has further acknowledged that:

> Under this policy, the Department will narrowly tailor the use of the states secrets privilege whenever possible to allow cases to move forward in the event that the sensitive information at issue is not critical to the case. As part of this policy, the Department also commits not to invoke the privilege for the purpose of concealing government wrongdoing or avoiding embarrassment to government agencies or officials. *Id.*

The new policies and procedures of the Department of Justice speak directly to this case and similar *Bivens* actions because the Department of Defense Report exposes the fact that Defendants abused the state secrets privilege by invoking the state secrets privilege upon a false basis where each and every one of Defendants' sworn reasons for invoking the privilege was false. R. 21, Response at Exh. 1, pp. ii, 5, 25-33, 48. Moreover, Defendants' clearly invoked the state secrets privilege

to conceal their wrongdoing and avoid embarrassment because the Department of Defense Report admits that, contrary to Defendants' false sworn statements, Tenenbaum was the victim of religious discrimination, an unlawful profile against American Jews and an improper criminal investigation disguised as a routine security clearance investigation. *Id.*

F. Application of Collateral Estoppel to Uphold Defendants' Invocation of the State Secrets Privilege on a False Basis Results in Manifest Injustice.

Manifest injustice is "[a]n error in the trial court that is direct, obvious, and observable." *See, Tennessee Protection & Advocacy, Inc. v. Wells*, 371 F.3d 342, 348 (6th Cir. 2004), *citing*, BLACK'S LAW DICTIONARY 974 (7th ed. 1999). Application of collateral estoppel in this case clearly results in manifest injustice for two reasons.

First, the Department of Defense Report admits that Defendants invoked the state secrets privilege on a false basis. R. 21, Response at Exh. 1, pp. ii, 5, 25-33, 48. The Department of Defense Report exposes each and every one of Defendants' sworn reasons for invoking the privilege as false. *Id.* Therefore, there is a direct, obvious and observable error in applying the doctrine of collateral estoppel to the Tenenbaums' *Bivens* action for denial of access to the courts.

Second, the Department of Defense Report admits that "no evidence" whatsoever supported Defendants' false accusations against Tenenbaum. R. 21, Response at Exh. 1, pp. 5 ("**FBI investigation has developed NO EVIDENCE**

to support the contention that [Tenenbaum] is involved in espio nage or treason against the United States") (emphasis added); *Id.* at p. 48 ("**NO EVIDENCE was developed to support the allegation**" of espionage against Tenenbaum) (emphasis added). In other words, Defendants had no evidence that would impinge upon national security in defense of the Tenenbaums' claims because there was no evidence against Tenenbaum, period. *Id.* Clearly, a manifest injustice has resulted from the application of collateral estoppel to the Tenenbaums' *Bivens* claim because, as a matter of logic, if no evidence existed against Tenenbaum, then no evidence could justify Defendants' false accusations which, as the Department of Defense Report admits, was the result of religious discrimination, an unlawful profile against American Jews and an unlawful investigation based upon such religious discrimination and profile.

CONCLUSION AND RELIEF SOUGHT

For all the foregoing reasons, Petitioners, David Aaron Tenenbaum and Madeline Gail Tenenbaum, respectfully request that this Honorable Court grant the instant Petition for Writ of Certiorari, or in the alternative, reverse the decisions of the United States District Court for the Eastern District of Michigan, Southern Division, and the United States Court of Appeals for the Sixth Circuit, and remand this case for further proceedings and trial.

Respectfully submitted,

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ADDENDA

ADDENDUM 1 — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT, FILED DECEMBER 20, 2010

NOT RECOMMENDED FOR
FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

File Name: 10a0774n.06
Case No. 09-1992

DAVID AARON TENENBAUM and
MADELINE GAIL TENENBAUM,

Plaintiffs-Appellants,

v.

UNITED STATES DEPARTMENT
OF DEFENSE, et al.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

BEFORE: BATCHELDER, Chief Judge; MOORE and COLE, Circuit Judges.

Addendum 1

ALICE M. BATCHELDER, Chief Judge. David and Madeline Tenenbaum (the "Tenenbaums") appeal the district court's dismissal of their lawsuit, filed pursuant to 42 U.S.C. § 1983, against Appellees, various government officials and entities who, the Tenenbaums claim, deprived them of their constitutional right to access the courts when Appellees allegedly filed false affidavits asserting the state-secrets privilege. Invocation of that privilege led to the dismissal of a prior § 1983 lawsuit brought by the Tenenbaums. Because we find that the Tenenbaums are collaterally estopped from relitigating the district court's application of the state-secrets doctrine in the prior case, we AFFIRM the judgment of the district court.

BACKGROUND

Mr. Tenenbaum is a civilian employee of the United States Army Automotive Armaments Command ("TACOM") who, from February 1997, to February 1998, was subjected to an intense and intrusive investigation (the "Investigation") into allegations that he had revealed classified information to the Israeli government. On October 14, 1998, the Tenenbaums filed their first lawsuit (the "1998 Lawsuit") against certain of the present defendants (the "1998 Defendants") for violation of their civil rights in connection with the Investigation. The 1998 Defendants moved for dismissal, claiming that they would be unable to mount a defense to the Tenenbaums' claims because the evidence necessary to their defense comprised state secrets.

In connection with their motion to dismiss, the 1998 Defendants submitted two sealed briefs, along with a large

volume of sealed documents supporting the state-secrets claim, and signed affidavits by then-Attorney General John Ashcroft ("Ashcroft"), then-Deputy Secretary of Defense Paul Wolfowitz ("Wolfowitz"), and Uldric Fiore ("Fiore"), then the Army Litigation Division Chief. After an in camera review of the supporting documentation, the court found that the 1998 Defendants could not defend the 1998 Lawsuit without resorting to use of state secrets and that the state-secrets doctrine therefore required dismissal of all claims. The Tenenbaums appealed and, after reviewing the sealed materials in support of the state-secrets assertion, we affirmed. *Tenenbaum v. Simonini*, 372 F.3d 776 (6th Cir. 2004).

On March 14, 2006, Senator Carl Levin made a formal request to the Office of the Inspector General at the Department of Defense that an investigation of the Tenenbaum matter be conducted. On July 13, 2008, the Department of Defense submitted its completed report (the "Report") to Senator Levin byway of the Senate Armed Services Committee. The Report presents certain factors that raised concerns regarding the possibility that Mr. Tenenbaum was engaged in espionage. The Report details the history of the Investigation, and concludes, among other things, that: (1) Mr. Tenenbaum was subjected to inappropriate treatment; (2) the Investigation deviated from established policies and procedures; (3) the Investigation was improperly used as a cover for a counterintelligence investigation; and (4) Mr. Tenenbaum's religion was a factor in the decision to commence the Investigation.

Addendum 1

The Report also contains several relevant qualifications. For example, while the Report states that investigators "reviewed relevant classified and unclassified records, including records relating to the affidavits of [Wolfowitz] and [Ashcroft]," it also declares that investigators "did not review the actions taken by the Department of Justice or the FBI" and therefore "were unable to perform a comprehensive review of the state secrets documents related to the case dismissal." The Report further states that it "should not be construed as commenting on the judicial decisions rendered in civil litigation."

On February 19, 2009, the Tenenbaums filed the present action. In their Complaint, the Tenenbaums allege that the 1998 Defendants, along with Ashcroft, Wolfowitz, and Fiore (collectively, the "2009 Defendants"), knowingly lied when they asserted the state-secrets privilege in the 1998 Lawsuit. The Tenenbaums argue that the Report proves that no evidence ever existed against Mr. Tenenbaum, and that the intense scrutiny Mr. Tenenbaum suffered was solely the result of religious discrimination by the 1998 Defendants and others, The Tenenbaums further argue that the 2009 Defendants could not have legitimately believed the state-secrets privilege applied in the 1998 Lawsuit.

The 2009 Defendants moved to dismiss the present case as barred by *res judicata,* collateral estoppel, and the statute of limitations, and on the grounds that the district court lacked personal and subject matter jurisdiction and that the Tenenbaums failed to state a claim. The district court expressly rejected the 2009 Defendants' personal

and subject matter jurisdiction claims, and did not rule on the Tenenbaums' *res judicata* and failure-to-state-a-claim arguments.[1] The district court concluded, however, that collateral estoppel precluded relitigation of the validity of the state-secrets doctrine. The district court therefore granted the 2009 Defendants' motion to dismiss, and the Tenenbaums filed this appeal.

ANALYSIS

As an initial matter, we are prepared to concede that during the Investigation the Tenenbaums were forced to endure a highly unusual amount of scrutiny and intrusion into their lives. We are also prepared to assume, for the purposes of this appeal, that Mr. Tenenbaum's religion played a role in the decision to investigate him. However, as the following analysis shows, any sympathy for the Tenenbaums' regrettable experiences cannot alter the district court's proper conclusion that collateral estoppel applies to bar the Tenenbaums' present case.

Whether collateral estoppel is applicable is a mixed question of law and fact which we review de novo. *Wolfe v. Perry*, 412 F.3d 707, 716 (6th Cir. 2005). "Issue preclusion, or collateral estoppel, bars subsequent relitigation of a fact or issue where that fact or issue was necessarily adjudicated in a prior cause of action and the same fact or issue is presented in a subsequent suit." *Cobbins v. Tenn. Dep't of Transp.*, 566 F.3d 582, 589 (6th Cir. 2009). Before

1. The 2009 Defendants do not challenge these portions of district court's decision.

the doctrine of collateral estoppel may be applied to bar relitigation of an issue, four requirements must be met: (1) the precise issue must have been raised and litigated in the prior action; (2) the determination of the issue must have been necessary to the outcome of the prior action; (3) the prior proceedings must have resulted in a final judgment on the merits; and (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding. *Id.* at 589-90.

The present action consists of a single claim, that the 2009 Defendants deprived the Tenenbaums of their constitutional right to meaningful access to the courts by the false invocation of the state-secrets doctrine in the 1998 Lawsuit. But that precise issue was directly addressed by the district court and this court in dismissing the 1998 Lawsuit, when it was determined that the state-secrets privilege had been properly invoked by the government and invocation of the privilege denied the 1998 Defendants any defense. The Tenenbaums' claims regarding invocation of the state-secrets privilege were therefore raised and litigated during the 1998 Lawsuit and were necessary to the final resolution of the case; the first three requirements for collateral estoppel have been satisfied.

The Tenenbaums argue, however, that collateral estoppel should not apply in this case because they were not allowed to fully and fairly litigate the state-secrets doctrine during the 1998 Lawsuit. The Tenenbaums were represented by counsel during the entirety of the 1998 Lawsuit, which was litigated both before the district

court and before us, but the Tenenbaums argue that they were deprived of the opportunity to fully litigate the issue because the 2009 Defendants "submitted *false* statements and sealed materials to the Courts to support their frivolous assertion of the state-secrets privilege in order to mislead and deceive the Courts into dismissing the 1998 Lawsuit."

The Tenenbaums' evidence for the alleged falsity of the sealed materials submitted during the 1998 Lawsuit is the findings of the Report. As discussed by the district court, however, any claim that the 2009 Defendants engaged in any falsehoods during the 1998 Lawsuit goes to the merits of the prior lawsuit, not to whether the Tenenbaums had the opportunity to fully and fairly litigate the assertion of the state-secrets privilege. Nevertheless, even if we were to accept the Tenenbaums' faulty premises, namely that (1) the alleged falsity of the sealed materials is relevant to the question of whether collateral estoppel applies, and (2) the conclusions of the Report are binding on this court, the Report would still be insufficient to overcome the application of collateral estoppel. By its own terms, the Report makes clear that investigators did not conduct a comprehensive review of the sealed documents and disclaims any intent to criticize or comment on the assertion of the state-secrets doctrine in the 1998 Lawsuit. There is simply no evidence that the Department of Defense's investigators even reviewed, let alone found false, the documents that were submitted under seal to the district court and this court during the 1998 Lawsuit. We find, therefore, that the Tenenbaums had a full and fair opportunity to litigate the state-secrets

question during the 1998 Lawsuit and that collateral estoppel bars relitigation of that question in the present case.

The Tenenbaums argue, in the alternative, that collateral estoppel should not be rigidly applied here because doing so would contravene public policy and result in manifest injustice. *Tipler v. E.I. duPont deNemours & Co.*, 443 F.2d 125, 128 (6th Cir. 1971). The Tenenbaums argue that there is an overriding public policy in favor of access to the courts, and that application of collateral estoppel would allow the 2009 Defendants to get away with their allegedly false and fraudulent invocation of the state-secrets privilege. As set forth above, however, the Report does not establish that the sealed materials in the 1998 Lawsuit were false, and the Tenenbaums' "manifest injustice" argument also fails.

CONCLUSION

Accordingly, we **AFFIRM** the judgment of the district court.

ADDENDUM 2 — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION, DATED JULY 23, 2009

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Case No. 09-10612

DAVID AARON TENENBAUM and
MADELINE GAIL TENENBAUM,

Plaintiffs,

v.

JOHN ASHCROFT, PAUL WOLFOWITZ,
ULDRIC FIORE, JOHN SIMONINI,
ALBERT D. SNYDER, MARK P.
YOURCHOCK, and ROBERT M. RILEY.

Defendants.

OPINION AND ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

Before the court is Plaintiffs' claim that Defendants denied them their constitutional right of access to the courts. Defendants have filed a "Motion to Dismiss First Amended Complaint Or In The Alternative For Summary Judgment." The matter has been fully briefed, and the court conducted a hearing on the matter on July 15,

2009. Plaintiffs' claim is barred under the doctrines of *res judicata* and collateral estoppel, and for the reasons stated below the court will grant Defendants' motion.

I. BACKGROUND

On October 14, 1998, Plaintiff David Aaron Tenenbaum, an engineer and employee of the United States Army Automotive Armaments Command ("TACOM"), and his wife, Plaintiff Madeline Gail Tenenbaum, initiated in this court an action claiming discriminatory disparate treatment based upon religion against Defendants John Simonini, Albert Snyder, Mark Yourchock, and Robert Riley (collectively, "Original Defendants").[1] The court set forth the facts which gave rise to the previous action as follows:

> "[Plaintiff] came under suspicion with respect to his relationship with engineers and other representatives of the Israeli armed forces, especially the Israeli Liaison officer to TACOM. Defendant Simonini considered Plaintiff a potential security risk. When Plaintiff requested a higher security classification, he was subject to a more intense scrutiny than was normally the case, including a polygraph examination. In the course of the examination, according to the examiner, Plaintiff made

1. Madeline Tenenbaum's claims were derivative in nature and thus the parties sometimes refer to Plaintiffs, collectively or individually as to David Tenenbaum, in the singular form as "Plaintiff."

> certain incriminating verbal statements relating to providing classified information to unauthorized persons. Plaintiff says that he never made such statements, and that the report of them is part of the discriminatory, conspiratorial vendetta against him. In any event, it is clear that Defendants became more highly concerned after hearing the report of the examiner, and stepped up the investigation into Plaintiff's activities. A federal search warrant was sought and obtained, and Plaintiff's home was searched. Plaintiff was placed on paid leave for over a year, and ultimately no criminal charges were brought against him."

Tenenbaum v. Lt. Col. John Simonini, 98-CV-74473, 2-3 (E.D. Mich. Sept. 30, 2002) (Pl.'s Ex. 2.).

The 1998 lawsuit included the following claims against the Original Defendants: (1) *Bivens* claims for violating and engaging in a conspiracy to violate Plaintiffs' Fourth Amendment rights by subjecting them to an unreasonable search and seizure without probable cause; (2) common law conspiracy in unlawfully investigating Plaintiff and manufacturing and attributing false confessions to Tenenbaum to finally justify an FBI criminal investigation; (3) defamation; (4) gross negligence; and (5) loss of consortium. The defendants in the 1998 lawsuit moved for summary judgment, and this court granted summary judgment, accepting the defendant's argument that they could not defend themselves against Plaintiffs' claims without disclosing information protected by the

state secrets privilege. On May 19, 2004, the Court of Appeals for the Sixth Circuit affirmed on the same basis. The Supreme Court declined to grant certiorari on November 29, 2004.

On March 14, 2006, a United States Senator, Carl Levin, signed a letter requesting that the Department of Defense conduct an investigation into the Plaintiffs' allegations. (Pl.'s Ex. 1 at 40-41.) After conducting its investigation of classified and unclassified material and information, the Department of Defense issued a report on July 13, 2008, finding that Plaintiff David Tenenbaum's race and ethnicity contributed to the "unusual and unwelcome scrutiny" into his affairs. (*Id.* at 27.) According to Plaintiffs, the report also found that Plaintiff David Tenenbaum was the victim of religious discrimination and that no evidence was found that would have supported the originally contemplated accusations against him.

Plaintiffs then initiated the instant case against the same Defendants who were named in the 1998 lawsuit and added three Defendants: former Attorney General John Ashcroft, former Deputy Secretary of Defense Paul Wolfowitz, and Uldric Fiore as the former Army Litigation Division Chief and General Counsel, Department of Defense Office of the Inspector General. The complaint contains only one count, asserted pursuant to *Bivens v. Six Unknown Fed'l Narcotics Agents*, 403 U.S. 388 (1971). Plaintiffs allege that Defendants deprived Plaintiffs of their right of access to the courts by falsely invoking the state secrets doctrine in the first lawsuit.

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Defendants move to dismiss the complaint on grounds that Plaintiffs' claim is barred by *res judicata*, collateral estoppel, and the statute of limitations. Defendants also assert that Plaintiffs' complaint should be dismissed for lack of personal and subject matter jurisdiction and its failure to state a claim. Plaintiffs oppose the motion.

II. DISCUSSION

A. Subject Matter Jurisdiction

Defendants contend that Plaintiffs' claim should be dismissed for lack of subject matter jurisdiction because Plaintiff has not cited a waiver of sovereign immunity for claims made against Defendants in their official capacities. The doctrine of sovereign immunity provides that the sovereign cannot be sued except when it consents to be sued. *United States v. Sherwood*, 312 U.S. 584, 586 (1941). Sovereign immunity applies to suits in which the United States is a named defendant as well as to suits in which a federal agency or its officials are named defendants. *Federal Deposit Insurance Corp. v. Meyer*, 510 U.S. 471, 475 (1994). In such suits, the plaintiff bears the burden of establishing waiver of sovereign immunity. *Clark v. State of Washington*, 366 F.2d 678 (9th Cir. 1966); *Knox v. The Regents of the Univ. of Wisconsin*, 385 F.Supp. 886, 887 (E.D. Wis. 1975); *Brown Bros. Equip. Co. v. State of Michigan*, 266 F.Supp. 506 (W.D. Mich. 1967).

However, nowhere in the amended complaint do Plaintiffs mention or suggest that their claim is a claim against Defendants in their official capacities; indeed,

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Plaintiffs clarify in their response that this *Bivens* action is against Defendants in their individual capacities. The court therefore maintains subject matter jurisdiction over this dispute, and Defendants' argument with respect to lack of subject matter jurisdiction is inapposite.

B. Personal Jurisdiction

Next, Defendants contend that this court does not have personal jurisdiction over Defendant Fiore. "The burden of establishing jurisdiction is on the plaintiff." *Tobin v. Astra Pharm. Prod., Inc.*, 993 F.2d 528, 543 (6th Cir. 1993). If the district court does not conduct an evidentiary hearing on the matter of personal jurisdiction, the plaintiff must make only a prima facie showing of jurisdiction. *See Dean v. Motel 6 Operating L.P.*, 134 F.3d 1269, 1272 (6th Cir. 1998). In such a case, the plaintiff must "'demonstrate facts which support a finding of jurisdiction in order to avoid a motion to dismiss.'" *Welsh v. Gibbs*, 631 F.2d 436, 438 (6th Cir. 1980) (quoting *Data Disc, Inc. v.* Sys. *Tech. Assocs.*, 557 F.2d 1280, 1285 (9th Cir. 1977)). Further, a court does not weigh the controverting assertions of the party seeking dismissal. *Dean*, 134 F.3d at 1272 (quoting *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1262 (6th Cir. 1996)).

Personal jurisdiction can be established in two manners:

> "'[G]eneral' jurisdiction, which depends upon a showing that the defendant has continuous and systematic contacts with the forum state

> sufficient to justify the state's exercise of judicial power with respect to any and all claims the plaintiff may have against the defendant, and 'specific' jurisdiction, which exposes the defendant to suit in the forum state only on claims that 'arise out of or relate to' a defendant's contacts with the forum."

Kerry Steel, Inc. v. Paragon Indus., Inc., 106 F.3d 147, 149 (6th Cir. 1997) (citations omitted). The Due Process Clause dictates that before a court may exercise personal jurisdiction over a nonresident defendant, the defendant must have sufficient minimum contacts with the forum state so as to not offend traditional notions of fair play and substantial justice. *See Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985). For personal jurisdiction to be proper, "there [must] be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1985) (citing *Int'l Shoe Co.*, 326 U.S. at 319).

Under Michigan's long-arm statute, personal jurisdiction exists where a defendant: (1) transacts any business within the state; or (2) does or causes an act to be done, or consequences to occur, in the state resulting in an action for tort. *See* Mich. Comp. Laws § 600.705(1)-(2). The Sixth Circuit has held that three factors are assessed in determining personal jurisdiction: (1) whether the defendant purposefully availed himself of acting in the

forum state or causing a consequence in the forum state; (2) whether the cause of action arose in the forum state from the defendant's act; and (3) whether the consequences from the defendant's act have a substantial enough connection with the forum state to make jurisdiction reasonable. *See Theunissen v. Matthews*, 935 F.2d 1454, 1460 (6th Cir. 1991) (citations omitted).

Defendants argue that there are absolutely no allegations suggesting that Defendant Fiore engaged in any activities that would endow a court sitting in Michigan with personal jurisdiction over him. Plaintiffs assert in their answer to Defendants' motion, that Fiore filed the Motion for Summary Judgment moving for the dismissal of the 1998 lawsuit by asserting the state secrets privilege.

Inasmuch as Plaintiffs' claim in the instant action is predicated upon Defendants' assertion of state secrets privilege, this court maintains jurisdiction over Defendant Fiore who, according to Plaintiffs, played a significant role in asserting the state secrets privilege in the 1998 lawsuit. Defendants' assertion of the state secrets privilege, the consequence of which was this court's dismissal of the 1998 lawsuit, is the central component to the instant action. Defendant Fiore's alleged involvement in the assertion of the state secrets privilege constitutes purposeful availment sufficient to establish personal jurisdiction over him. Further, the damages which Plaintiffs allege arose in Michigan. For these reasons, this court maintains personal jurisdiction over Defendant Fiore.

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C. *Res Judicata* and Collateral Estoppel

Defendants contend that this action is based upon the same set of facts that gave rise to Plaintiff's 1998 lawsuit, and that the order dismissing the prior action bars litigation of the claims raised in the instant action. "The doctrine of *res judicata,* or claim preclusion, provides that a final judgment on the merits of an action precludes the 'parties or their privies from relitigating issues that were or could have been raised' in a prior action." *Kane v. Magna Mixer Co.*, 71 F. 3d 555, 560 (6th Cir. 1995)(quoting *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981)). Under the doctrine of *res judicata*, a party is precluded from bringing a claim when there exists "(1) a final decision on the merits by a court of competent jurisdiction; (2) a subsequent action between the same parties or their 'privies[';] (3) an issue in the subsequent action which was litigated or should have been litigated in the prior action; and (4) an identity of the causes of action." *United States v. Vasilakos*, 508 F.3d 401, 406 (6th Cir. 2007) (alteration in original) (quoting *Saylor v. United States*, 315 F.3d 664, 668 (6th Cir. 2003)).

The doctrine of collateral estoppel, or issue preclusion, "dictates that 'once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case.'" *Aircraft Braking Systems Corp. v. Local 856, Int'l Union, United Automobile, Aerospace and Agricultural Implement Workers, UAW*, 97 F.3d 155, 161 (6th Cir. 1996) (quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980)). The Sixth

Circuit has found four criteria necessary to preclude further litigation under the doctrine of collateral estoppel: (1) the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding; (2) determination of the issue must have been necessary to the outcome of the prior proceeding; (3) the prior proceeding must have resulted in a final judgment on the merits; (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding. *Bills v. Aseltine*, 52 F.3d 596, 604 (6th Cir. 1995) (citing *Detroit Police Officers Ass'n v. Young*, 824 F.2d 512, 515 (6th Cir. 1987)).

In the instant action, Plaintiffs claim that Defendants deprived them of their fundamental Constitutional right to have adequate, effective and meaningful access to the courts by falsely asserting the state secrets privilege in the 1998 lawsuit. Plaintiffs are, however, collaterally estopped from relitigating the propriety of the assertion of the state secrets doctrine. This issue was raised and litigated in the 1998 lawsuit, resulting in a dismissal precisely because of the state secrets doctrine. Plaintiffs, against whom collateral estoppel is being applied, were both parties to the 1998 lawsuit.

In the 1998 lawsuit, the court explained the state secrets doctrine as follows:

> The state secrets doctrine is based upon the states secret privilege, which protects against disclosure of information that may adversely affect national security interests. This privilege

"head[s] the list" of evidentiary privileges. *Halkin v. Helms*, 598 F.2d 1, 7 (D.C. Cir. 1978). The Executive Branch may invoke the privilege where the disclosure of state secrets could harm the nation's defense capabilities, disclose intelligence-gathering methods or capabilities, or disrupt diplomatic relations with foreign governments. See *Ellsberg v. Mitchell*, 709 F.2d 51, 56-57 (D.C. Cir. 1983).

The government is given broad latitude with respect to the circumstances in which it may invoke the privilege. *See Zuckerbraun v. General Dynamics Corp.*, 935 F.2d 544, 546-47 (2d Cir. 1991). Indeed, the government may invoke the privilege to protect even unclassified information. *Maxwell v. First Nat'l Bank of Maryland*, 143 F.R.D. 590, 596 n.6 (D. Md. 1992), aff'd, 998 F.2d 1009 (4th Cir. 1993). Additionally, courts will uphold a claim of privilege for information that may seem harmless standing alone, but that, when added to other information, poses a reasonable danger of divulging too much to a "sophisticated intelligence analysis." *In re United States*, 872 F.2d 472, 475 (D.C. Cir. 1989) (citing *Halkin*, 598 F.2d at 10). Accordingly, in reviewing the assertion of the state secrets privilege, a court's standard of review "is a narrow one. Courts should accord the 'utmost deference' to executive assertions of privilege upon grounds of military or diplomatic secrets." *Halkin*, 598

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F.2d at 9 (quoting *United States v. Nixon*, 418 U.S. 683, 710 (1974)). As stated by the Supreme Court,

> [t]he decisions of the Director [of Central Intelligence], who must of course be familiar with "the whole picture," as judges are not, are worthy of great deference given the magnitude of the national security interests and potential risks at stake. It is conceivable that the mere explanation of why information must be withheld can convey valuable information to a foreign intelligence agency .... And it is the responsibility of the Director of Central Intelligence, not that of the judiciary, to weigh the variety of complex and subtle factors in determining whether disclosure of information may lead to an unacceptable risk of compromising the Agency's intelligence-gathering process.

Cent. Intelligence Agency v. Sims, 471 U.S. 159, 179-80 (1985).

(9/3/02 Order at 3-4.) The court continued, stating:

> Where the very subject matter of an action is a state secret, dismissal of the entire complaint

> is warranted. *See United States v. Roberts*, 345 U.S. 1, 11 n.26 (1953) (citing *Totten v. United States*, 92 U.S. 105 (1875) as an example of such a dismissal); *see also Kasza v. Browner*, 133 F.3d 1159, 1170 (9th Cir. 1998) ("Not only does the state secrets privilege bar Frost from establishing her *prima facie* case on any of her eleven claims, but any further proceeding in this matter would jeopardize national security .... Therefore, as the very subject matter of Frost's action is a state secret, we agree with the district court that her action must be dismissed."); *Black v. United States*, 62 F.3d 1115, 1119 (8th Cir. 1995) (finding dismissal appropriate, where the "information covered by the privilege is at the core of [the plaintiff's] claims, and we are satisfied that the litigation cannot be tailored to accommodate the loss of the privileged information.").

(*Id.* at 5-6.)

In the 1998 lawsuit, the court applied this body of law in finding that the state secrets doctrine prohibited the case from proceeding. The court held that "after reviewing the numerous classified declarations and documents which were filed under seal, the court is firmly convinced that the state secrets doctrine applies in this case and makes dismissal necessary." (*Id.* at 7.) The court found that if it "were to allow any claim to proceed, ... Defendants could not adequately defend against Plaintiff's assertions, because such defense would entail disclosure of facts which

would create a reasonable, if not certain, danger to national security." (*Id.* at 9.) The court's conclusions were upheld by the Sixth Circuit, and the Supreme Court declined to grant certiorari. At every stage of the litigation, Plaintiffs were represented by counsel and actively opposed the invocation of the state secrets doctrine. The issue of the applicability of the state secrets doctrine, therefore, was fully litigated in the 1998 lawsuit.

Plaintiffs, in their response to Defendant's motion, rely exclusively upon *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461 (1982), in contending that the doctrines of *res judicata* and collateral estoppel do not apply in this case, arguing that they were never afforded an opportunity to fully or fairly litigate the 1998 lawsuit. While the Court noted in *Kremer* that *res judicata* and collateral estoppel do not apply where losing parties did not have a full and fair opportunity to litigate the claim or issue, the Court also clarified that "[r]edetermination of issues is warranted if there is a reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation." *Id.* at 481 (quoting *Montana v. United States*, 440 U.S. 147, 164, n.11 (1979)).

Plaintiffs argue that they were not allowed the opportunity to fully and fairly litigate the 1998 lawsuit because the sealed affidavits which the court reviewed to determine the applicability of the state secrets doctrine were not disclosed to them. Plaintiffs further argue that "the Department of Defense has officially revealed in its formal Report after a comprehensive, independent

investigation that 'no evidence supported the accusations against Tenenbaum,' thereby exposing the Sealed Affidavits as false." (Pls.' Resp. at 14, emphasis omitted.) However, the focus of the court's inquiry here is not on whatever merits the prior lawsuit itself may have had, but on whether Plaintiffs had an opportunity to oppose and litigate the applicability of the state secrets doctrine.

Plaintiffs assert what the court views as a string of arguments that employ entirely misguided logic and are premised on faulty legal reasoning. Plaintiffs first contend that because the Department of Defense has allegedly cleared Tenenbaum of any illegal espionage activity, then Defendants' investigations into Tenenbaum's activities and alleged accusations were necessarily discriminatory. Plaintiffs extrapolate that because Defendants' actions were necessarily discriminatory then they must have submitted false affidavits to the court in the 1998 lawsuit and the state secrets doctrine was therefore improperly invoked. Plaintiffs finally assert that because the state secrets doctrine, premised on false affidavits, was improperly invoked, the 1998 lawsuit was not fully and fairly litigated and thus has no preclusive effect on this litigation. Each step of this argument, however, is infused with problems.

As an initial concern, in order to accept each step of Plaintiffs' reasoning, the court must accept the underlying premise that Department of Defense findings have some kind of precedential impact on this court's prior opinion, as affirmed by the 6th Circuit. Plaintiffs have neither

argued nor shown what impact, legally,[2] a letter authored by a member of Congress or a Department of Defense report could have on the finality of this court's 2002 opinion, as affirmed by the Sixth Circuit. There are, of course, substantial differences between an agency inquiry and a federal court case in evidentiary and procedural practices and in the materials reviewed.[3] Plaintiffs have provided the court with no authority suggesting that a subsequent administrative or congressional proceeding may somehow invalidate or effectively overrule an Article III court's judgment. Indeed, the report itself disclaims any similar import or interpretation. (*See* Pls.' Resp. Ex. 1 at 38, "Additionally, our review should not be construed as commenting on the judicial decisions rendered in

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2. The court stresses that it is concerned about the legal impact of the administrative or congressional proceedings, not the exact nature or import of the factual findings of the proceedings. This is not a situation where additional discovery is necessary to flesh out the facts of the case.

3. There is no indication, for example, that the Department of Defense had access to all, or indeed any, of the materials this court reviewed under seal. In fact, the report itself contains a "Limitation to Scope," which qualifies, among other things, that the Department of Defense "did not review the actions taken by the Department of Justice or the FBI" and, although requested, the Department of Defense did not receive a copy of the unredacted case documentation filed by the FBI in the previous litigation. (*See* Pls.' Resp. Ex. 1 at 38.) The report specifically states that "we were unable to perform a comprehensive review of the state secrets documents related to the case dismissal." (*Id.*)

the Complainant's civil litigation.")[4] Thus, Plaintiffs' arguments all rest on a shaky, if not imaginary, premise that a Department of Defense report can be relied upon to cast doubt upon this court's previous holdings.

Moreover, even if the subsequent Department of Defense report were seen as having some impact on this court's 2002 opinion, the court cannot accept any step of Plaintiffs' arguments, as each is factually and legally untenable. First, the court does not accept the proposition that if the Department of Defense report cleared Tenenbaum of any illegal espionage activity, as Plaintiffs assert, then Defendants' investigations into Tenenbaum's activities and alleged accusations were *necessarily* discriminatory. Plaintiffs assume throughout their arguments that if Tenenbaum could only prove he did not engage in espionage activities then Defendants necessarily discriminated against him. This, however, is not so. It is feasible that Tenenbaum could have been completely innocent of any illegal behavior and simultaneously feasible that, despite this, Defendants'

4. It strikes the court that there may be serious separation of powers issues inherent in such an argument, although the parties have not directly briefed this issue. Such issues may have motivated the Department's report so specifically disavowing any implication that its comments or conclusions might have been seen as having criticized court rulings. Senator Levin, as well, pointed out in his letter calling for the investigation that it should be accomplished "without the disclosure of any classified information," thus indicating that earlier court review and determination based upon such materials would not be implicated.

inquiries into his behavior did not constitute *illegal* discrimination. The merits of the investigations into Plaintiffs' affairs and accusations against Plaintiffs are not necessarily determinative of the merits of the discrimination action against Defendants. It is simply a false argument to imply, as Plaintiffs certainly do, that an investigation must be void *ab initio* where the eventual result of the investigation serves to clear the person suspected.[5] The Department of Defense report cannot be relied upon to show Defendants' liability under Title VII.[6]

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5. Indeed, law enforcement officers may investigate even claims the legitimacy of which may be doubtful and which ultimately uncover nothing, and still act properly. A federal grand jury may investigate aggressively but nonetheless return a no true bill in the event that the investigation reveals excusable, not criminal, activity. Such investigations are not rendered improper by virtue of their results.

6. The court recognizes that the report also found that Tenenbaum was the subject of "inappropriate treatment" (Pl.'s Resp. Ex. 1 at i) and that his "religion and ethnicity was a factor or indicator in the decision to continue the inappropriate [Personnel Security Investigation]." (*Id.* at 25.) However, the finding of "inappropriate" behavior, in this context, does not necessarily equate to legal discrimination, as defined under Title VII. The report states, relating to the investigation of Plaintiffs, that "[t]his unusual and unwelcome scrutiny because of his faith and ethnic background would undoubtedly fit a definition of discrimination, *whether actionable or not.*" (Pl.'s Resp. Ex. 1 at 27.) Thus, the report itself was not directed at determining whether Defendants actions constituted discrimination under Title VII, only at whether the Department of the Army and Defense Investigative Service officials handled Tenebaum's situation *properly*, not necessarily whether they handled it inconsistently with prevailing legal standards.

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Similarly problematic is Plaintiffs' second step to their argument, that because Defendants' actions were necessarily discriminatory then they must have submitted false affidavits to the court in the 1998 lawsuit, resulting in the state secrets doctrine being improperly ("falsely") invoked. Plaintiffs' counsel attempted to elucidate this theory at the July 15, 2009 hearing, explaining that because the Department of Defense allegedly found that Defendants acted discriminatorily (which, as stated above, the court does not necessarily accept) then they had no defense to Plaintiffs' 1998 action. Counsel suggests that, therefore, the invocation of the state secrets doctrine was improper because no state secrets would be revealed at trial inasmuch as Defendants could present no defense to their actions. The court disagrees with the logic of this argument. As expressed at the July 15, 2009 hearing, it is entirely conceivable that the state secrets doctrine could be invoked to dismiss an otherwise meritorious cause of action. In dismissing the 1998 case, the court held only that because the state secrets privilege prevented Defendants from providing a defense to Plaintiffs' claims, the case had to be dismissed. The court did not find that Plaintiffs' claims were without merit or that Plaintiffs would not be able to present evidence establishing their claims if they had proceeded to trial. Indeed, the court could not reach either the merits of Plaintiffs' claims or the merits of Defendants defenses, because the state secrets privilege prevented the parties from proceeding. The merit of an underlying claim of liability is not the only possible, or even likely, motivating cause of the assertion of a procedural bar. The plainest explanation is also one that is beyond debate: a procedural bar can be asserted simply because

it may apply. There is, in fact, no imaginable procedural bar that cannot be used to defeat an otherwise-legitimate claim of liability. Statutes of repose or limitation commonly defeat otherwise sustainable claims. A failure to exhaust administrative remedies often defeats legitimate claims. A defect in the service of process divests the court of jurisdiction and prohibits an apparently meritorious case from proceeding. Likewise, the merit of the state secrets doctrine does not relate to the merits of Plaintiffs' claims.[7] Thus, whatever the Department of Defense report may have found with respect to Tenenbaum's alleged espionage-tinged behavior or Defendants' alleged discriminatory behavior is simply irrelevant as to whether the state secrets doctrine prevented Defendants from providing some or all of their defenses[8] in the first lawsuit.

Finally, the court cannot accept the last step of Plaintiffs' logic which, incidentally, is the only argument directly relevant to the fundamental question before the

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7. Or, in response to how Plaintiffs' have phrased their argument, the merit of the state secrets invocation does not equate to the merit of Defendants' defense.

8. Further, even if Plaintiffs were able to establish a *prima facie* case of discrimination, there are nonetheless defenses available to Defendants, and arguments which could be made to a jury in explanation of Defendants' behavior. That one group of persons at the Department of Defense found Defendants actions to be improper or even, as Plaintiffs argue, legally discriminatory, does not mean that every rational jury would so find. Of course, since the court found that Defendants could not present a defense without revealing state secrets, the case simply could not proceed to a jury.

court, whether this action is precluded under the doctrines of *res judicata* and collateral estoppel. Plaintiffs argue that because the state secrets doctrine, premised on so-called false affidavits, was improperly invoked, the 1998 lawsuit was not fully and fairly litigated and thus has no preclusive effect on this litigation. Plaintiffs intimate that the very nature of the application of the state secrets doctrine precluded them from fully and fairly litigating the case,[9] and therefore, since the doctrine was invalidly asserted, this case cannot be barred. The court disagrees.

Even assuming, as suggested by Plaintiffs, that the state secrets doctrine was improperly invoked-even assuming that Defendants lied under oath,[10] that this court was misleaded into applying the doctrine and the Sixth Circuit was incorrect in affirming the court--Plaintiffs

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9. Under Plaintiffs' argument, *any* case in which the state secrets doctrine was invoked would not later be entitled to any preclusive effect because, in analyzing the applicability of the doctrine, a court would undoubtedly have resorted to a review *in camera* of sealed materials.

10. As an overarching observation, however, the court believes that Plaintiffs' argument begs the question of whether Defendants' impure let's-try-to-avoid-liability motive in invoking the privilege prevented Plaintiffs from "fully and fairly" litigating the privilege. The argument, in other words, assumes the truth of the very proposition Plaintiffs attempt to prove: that Plaintiffs were in fact prevented from adequately litigating the question. But the truth is that the motive of a bar-asserting defendant, for good or ill, is not relevant to the ability of a party to litigate a privilege and therefore does not serve to prove the proposition even if the motive were undeniably evil.

still cannot avoid the effect of *res judicata*. Indeed, that doctrine exists to avoid the very situation presented by this case: an unhappy litigant revisits the court complaining that the prior result was in error. Plaintiffs here cannot proceed on any theory of liability under their current complaint without a showing and a holding by this court that the prior lawsuit's result was wrong. The court cannot so hold unless Plaintiffs show that they did not have an opportunity to fully and fairly litigate the issue of the state secrets doctrine.

Fundamentally--first, last and always--this case and the 1998 lawsuit turn on procedural bars which have nothing, or almost nothing, to do with the merits to Plaintiffs' claims. The 1998 lawsuit was prevented by the procedural bar of the state secrets doctrine and this lawsuit is prevented by the procedural bar of *res judicata*. While the Department of Defense's report may have served, to some extent, to clear Plaintiff's name of various illegal activities,[11] it does not shed any light upon or in any way re-open the issue of the invocation of the state secrets doctrine. In order to bypass the preclusive nature of the court's prior holding, as affirmed by the Sixth Circuit, Plaintiffs must show that the procedure employed by this court and the appellate court was somehow infirm.

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11. The cover letter to the Department of Defense report states that "the initial personnel security and counterintelligence investigation process was poorly handled and managed, although the appeal process ultimately exonerated Mr. David Tenenbaum. It is my belief that Mr. Tenenbaum is, and always has been, a dedicated, loyal and professional civil servant in the service of our Nation." (Pls.' Resp. Ex. 1.)

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Arguing the merits of their 1998 claims, as Plaintiffs purport to demonstrate by the Department of Defense report, does not show any deficiency in "the quality, extensiveness, or fairness of *procedures* followed in prior litigation." *Kremer,* 456 U.S. at 481 (quoting *Montana,* 440 U.S. at 164, n.11) (emphasis added).

In granting Defendants' motion for summary judgment based on the effect of state secrets privilege on the litigation, this court reviewed affidavits and relevant documents, and considered the parties' briefing. The Sixth Circuit, in affirming this court's order granting Defendant's motion for summary judgment, held in pertinent part:

> Having reviewed the materials Defendants produced under seal, we agree with the district court that the state secrets doctrine applies because a reasonable danger exists that disclosing the information in court proceedings would harm national security interests, or would impair national defense capabilities, disclose intelligence-gathering methods or capabilities, or disrupt diplomatic relations with foreign governments. *Ellsberg,* 709 F.2d at 56-57; *United States v. Reynolds,* 345 U.S. 1, 10, 73 S.Ct. 528, 97 L.Ed. 727 (1953) (holding that courts may accept the government's assertion of the state secrets privilege if they are satisfied that there is a "reasonable danger" that disclosing the evidence will expose information that "in the interest of national security, should not be divulged.").

Addendum 2

> We further conclude that Defendants cannot defend their conduct with respect to Tenenbaum without revealing the privileged information. Because the state secrets doctrine thus deprives Defendants of a valid defense to the Tenenbaums' claims, we find that the district court properly dismissed the claims.

Tenenbaum v, Simonini, 372 F.3d 776, 777 (6th Cir. 2004) (citations omitted). Plaintiffs have "received all the process that was constitutionally required." *Kremer*, 456 U.S. at 483 (1982). In so holding, the court "bear[s] in mind that no single model of procedural fairness, let alone a particular form of procedure, is dictated by the Due Process Clause." *Id.* Here, Plaintiffs submitted briefs both at the trial court level and on appeal challenging the state secrets doctrine and received the benefit of two courts reviewing and determining the issue. There is no reason to doubt the quality, extensiveness, or fairness of the *procedures* followed in the litigation of the 1998 lawsuit. *Id.*

The Supreme Court has "stressed that '[t]he doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts .... " *Federated Dep't Stores, Inc.*, 452 U.S. at 401 (quoting *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299 (1917)). Plaintiffs' current action rests entirely on the alleged impropriety of prior invocation of the state secrets doctrine. Plaintiffs simply cannot proceed without a finding that the court's previous

dismissal was in error. However, this court's dismissal of the 1998 lawsuit and the Sixth Circuit's affirmation of the dismissal constitute final adjudication on the issue of the propriety of the state secrets doctrine. Relitigation of that issue should be, and is, barred. Accordingly, Defendants' motion must be granted and this action must be dismissed.[12]

III. CONCLUSION

For the reasons stated above, IT IS ORDERED that Defendants' "Motion to Dismiss First Amended Complaint Or In the Alternative For Summary Judgment" [Dkt. # 20] is GRANTED and that this action is DISMISSED WITH PREJUDICE.

/s/
ROBERT H. CLELAND
UNITED STATES DISTRICT JUDGE

Dated: July 23, 2009

12. In light of this conclusion, the court need not reach Defendants' alternative arguments that (1) the complaint fails to state a claim on which relief can be granted and (2) the complaint was filed outside of the statute of limitations.